IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

MONTGOMERY WARD & CO., INCORPORATED,
Petitioner,

v.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY TO BRIEF FOR THE RESPONDENTS.

POINTS COVERED BY THIS REPLY BRIEF.

First: The third point in Respondents' Brief (pp. 13-14) is that:

> "• • • it would have been an abuse of discretion, in the circumstances of this case, to have granted injunctive relief."

This is the first time this argument has been advanced. Since the opinion of the Court of Appeals does not discuss the point, it is of doubtful relevance at this time. In any event, it can be succinctly answered.

Second: Respondents' Brief admits (pp. 7-16) that "the question presented as to the reviewability of the Board orders is important". Respondent's Brief does not contend that the question has heretofore been settled by this Court, but argues against review solely because "of the clear correctness of the decision below, as well as the absence of any conflict of authority".

Petitioner proposes to show that at least three state courts have reached conclusions which are in logical conflict with the basic reasoning of the Court of Appeals. The question should therefore be settled by this Court.

Point One.

Petitioner's Complaint Did Not Ask for Relief Which Would Have Involved an Abuse of Discretion By the Trial Court.

First: The four cases primarily relied on by Respondents do not show that issuance of the injunction asked in the present case would have amounted to an abuse of discretion.

1. *Commonwealth of Pennsylvania* v. *Williams,* 294 U. S. 176, simply held that a federal court should relinquish jurisdiction to a state officer authorized to grant the same relief as the court was asked to grant, since "it reasonably appears that private right will not suffer" (294 U. S. at p. 185).

The result reached was no more than a specific application of the rule that injunctions will not ordinarily be granted except to avoid irreparable injury and in cases where no other adequate remedy less drastic in character is available.

2. *The Hecht Co.* v. *Bowles,* 321 U. S. 321, held that granting of an injunction whenever a violation of the Price Control Act has been discovered is not mandatory on a district court, since the court might make some other order "more appropriate for the evil at hand". The opinion did not attempt to define the circumstances under which the granting of an injunction would have been an abuse of discretion.

3. *City of Harrisonville* v. *Dickey Clay Mfg. Co.,* 289 U. S. 334, held that "complete monetary redress" rather than an injunction should have been given (289 U. S. at p. 339). Here again, the reason for the result was that an injunction will not be granted when adequate money damages can be obtained.

4. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, disapproved of the grant by a trial court of a stay during appeal of an order of the Interstate Commerce Commission which the same court had upheld. Obviously, since the complainant had lost on the merits, it had little or no right to the stay. This holding appears to be entirely irrelevant to the present case.

The most that these four cases hold is that Federal equity courts will forego jurisdiction when other available remedies make it certain that "the private right will not suffer". None of the four announce any principle which would make the granting of an injunction under the circumstances alleged by the plaintiff in the present case an abuse of discretion.

Second: Even if Respondents' proposition were correct as stated it would not apply to Petitioner's request for a declaratory judgment.

The four cases cited all deal with a refusal of the drastic remedy of injunction and in the second and third of them less drastic remedies which established the rights of the parties were specifically approved. Since Petitioner asks not only for an injunction but for the more pacific remedy of a declaration of right, the proposition advanced by the respondents cannot possibly support the dismissal of the complaint in the present case *in toto*.

Third: If orders of the War Labor Board are mere appeals to a "moral obligation", or merely "informatory or at most advisory", as counsel contend and as the Court of Appeals held, the relief sought could not in any way be adverse to the public interest.

Enjoining enforcement of orders which are admittedly unenforceable certainly would not interrupt the proper functioning of the Board, and hence could not be adverse to the public interest. *A fortiori,* a judgment declaring that Board orders have no more force than the Board itself claims for them could not under any conceivable circumstances embarrass the Board in any honest attempt to perform its duties.

Point Two.

Since Respondents Admit That the Question of the Reviewability of Board Orders Is Important and Has Not Yet Been Decided By This Court, the Question Is One Which Should Be Decided By This Court in View of Three State Court Decisions Which Take a Different View As to the Effect of Board Orders.

Respondents contend that review is unnecessary "in view of the clear correctness of the decision below as well

as the absence of any conflict of authorities" (Respondents' Brief, p. 16).

Presumably what Respondents mean is that the question of substance presented, which relates to the construction of a statute of the United States and which has not been decided by this Court, need not, under Rule 38(5)(c) of this Court, be decided because the interpretation of the Court of Appeals is clearly correct and will doubtless be universally accepted.

This argument is completely answered by the fact that at least three state courts have interpreted the powers of the Board in a manner diametrically opposed in logic to the interpretation upon which the decision of the Court of Appeals is based.

The Court of Appeals based its interpretation of the War Labor Disputes Act upon that phase of the legislative history which showed that Respondent Davis wrote to the Congressional conference committee asserting that "no legal change in the status of Board orders is necessary", that such orders were "in reality mere declarations of the equities of each industrial dispute", and that the appeal of the Board was "to the moral obligation of employers and workers to abide by the no-strike, no-lockout agreement" (*Employers' Group of Motor Freight Carriers. Inc.* v. *N. W. L. B.*, 143 Fed. (2d) 145 at p. 149). Hence the Court of Appeals held that "Any action of the Board would be informatory and at most advisory" (*Employers' Group of Motor Freight Carriers, Inc.*, v. *N. W. L. B.*, 143 Fed. (2d) at p. 151), that the War Labor Disputes Act does not "show an intent on the part of Congress to create legal rights" (decision below, *N. W. L. B.* v. *Montgomery Ward & Co.*, 144 Fed. (2d) 528 at p. 530, footnote 6), and that Board orders are not "enforceable" (decision below, 144 Fed. (2d) at p. 530).

Respondents accurately repeat the views which they successfully urged upon the Court of Appeals when they say:

> "The Board's order neither altered the legal rights of the parties nor imposed legal sanctions of any kind".
>
> (Respondent's Brief, p. 9).

The decision of the Court of Appeals was unquestionably based upon the conclusion that Board orders do not fix or alter legal rights.

At least three state courts have decided, to the contrary, that Board orders do have legal consequences.

Since this Petition was filed, the Supreme Court of the State of Wisconsin on October 10, 1944, decided the case of *International Brotherhood of Paper Makers, Local No. 66, A. F. L., et al.* v. *Wisconsin Employment Relations Board, et al., No. 27,* reported in Volume 15 of the Labor Relations Reporter, pages 224-225. The Wisconsin Court had before it an order of the Wisconsin Employment Relations Board requiring an employer to cease and desist from enforcing a union shop provision in a collective bargaining contract. The Court said:

> "Upon the hearing there was brought to the attention of the court by stipulation of the parties, the fact that after the entry of the judgment modifying and confirming the order of the Wisconsin Board, the National War Labor Board had entered an order directing the Rhinelander Paper Company to include in its contract with the union, the closed-shop clause which the Wisconsin Employment Relations Board order required it to delete. This order of the National War Labor Board so far as it appears from the record has never been reviewed and is still in full force and effect. This order having been issued in the exercise of the war powers of the Executive

in time of war supplants and operates to suspend state action in regard to the same subject matter. It would appear therefore that reinstatement of the discharged employee at this time would be in conflict with the order of the National War Labor Board.

"It is ordered that the above entitled matter remain in suspension in this court for the duration of the war or until such time as the order of the National War Labor Board ceases to be effective."

In *Pearson Candy Co., Ltd.* v. *Waits, individually and as representative of Bakery and Confectionery Workers International Union of America, Local No. 417*, the California Superior Court on December 17, 1943, in an opinion reported in Volume 13 of the Labor Relations Reporter 558, at pages 558-559, said:

"Section 7 of the War Labor Disputes Act undoubtedly grants the powers above exercised to the National War Labor Board, together with power to enforce its decisions and directives by means of sanctions or other recognized methods. * * *

"There can be no doubt that in passing the War Labor Disputes Act Congress intended to give to the War Labor Board full power to decide any dispute between employer and employees in any labor disputes which in the opinion of the Board has become so serious that it may lead to substantial interference with the war effort. And furthermore this power stems directly from the war powers of the United States Government as exercised by the President.* * *

"From all of which it appears that, for the duration at least, state courts are deprived of power to adjudicate the validity of labor contracts affecting interstate commerce, and giving rise to a labor dispute which the War Labor Board deems so serious as to lead to substantial interference with the war effort, and over which it assumes jurisdiction. Both the complaint of the plaintiff and the cross-complaint of defendant union should therefore be ordered dismissed."

On September 19, 1944, the Illinois Appellate Court for the Second District issued its opinion in *Frank Foundries Corp.* v. *Creager*, (Ill. App., 2d Dist.), reported subsequent to the filing of this Petition, in Vol. 15 Labor Relations Reporter, at p. 187, saying:

> "By vesting the [War Labor] Board with jurisdiction of labor disputes which may lead to substantial interference with the war effort, the War Labor Disputes Act is analogous to the peacetime Federal Employers' Liability Act, which, it is held, exclusively occupies the field in cases involving injuries to employees engaged in interstate commerce, or in duties connected with or in furtherance thereof, and supersedes the Workmen's Compensation Act of this State.
> * * *
> "Considering appellant's statement that it employes, under average conditions, about 200 men, subject to collective bargaining, and the well known necessary requirement for and the practically universal employment of all iron and steel industries in the war effort, the fact that a labor dispute and a strike in appellant's plant would substantially interfere with the war effort, needs no further exposition. We think there can be no doubt that to such disputes the Federal War Labor Disputes Act supersedes all statutory enactments of this State on the subject, general and special."

The holding in these three cases is in necessary logical conflict with the holding of the Court of Appeals of the District of Columbia in the present case.

If Board orders are merely advice, they cannot license violations of state laws.

If Board orders do not alter the legal rights of the parties, they do not give an employer the legal right to do what otherwise would constitute a violation of state law.

If Board orders do not create the right to do what state law forbids, Board orders do not "supplant or suspend" state law.

If Board orders do not supplant or suspend state law, state courts are not deprived of the power to adjudicate the validity of labor contracts under state law.

If the War Labor Disputes Act does not empower the Board to issue legally binding orders, it does not "supersede all statutory enactments of the state" applicable to labor disputes affecting the war effort.

The Respondents themselves have added to the confusion upon this point by issuing an opinion on October 26, 1944, again subsequent to the filing of this Petition, in *Cudahy Brothers Company and Packinghouse Workers Organizing Committee, Local 40 (CIO)*, Case No. 111-1494-D, reported in Volume 15, Labor Relations Reporter, p. 237, saying:

> "The General Counsel of the National War Labor Board in his opinion on the validity of the position taken by the Cudahy Brothers Company holds that even if the Wisconsin Employment Peace Act did forbid the inclusion in the union contract of a provision for union maintenance of membership, this Board would still have authority to direct such provision of settlement of a labor dispute in an establishment as important to the war effort as is the plant of this company. This position rests upon the fact that the nation is now at war and the winning of the war in the shortest possible time is our present greatest objective. There is much support, including many Supreme Court decisions, for the view that where state laws conflict with authority lawfully exercised in time of war under the war powers which the Constitution confers upon the National Government, the state laws cannot be applied to impede the war effort."

The time has come for this Court to resolve these conflicting and confusing interpretations of the War Labor Disputes Act, and to decide whether Board orders do or do not have legal consequences.

Respectfully submitted,

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